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Kevin L. Smith

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ATTORNEYS FOR APPELLEE:

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**IN THE
COURT OF APPEALS OF INDIANA**

JESSIE SMITH,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0803-CR-248
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Young, Judge
Cause No. 49G20-0502-FA-17818

November 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a jury trial, Jessie Smith was convicted of Possession of Cocaine,¹ a class A felony, and Possession of a Controlled Substance,² a class C felony, and was subsequently sentenced to an aggregate executed term of twenty years. Upon appeal, Smith challenges both of his convictions, arguing that the evidence was insufficient to establish that he knowingly possessed the contraband.

We affirm.

The facts most favorable to the convictions reveal that on February 3, 2005, a team of four police officers executed a narcotics search warrant at Smith's residence in Marion County. Smith's home was located 656 feet from a public park and a child was seen playing between the park and Smith's residence when the officers were en route to serve the search warrant. When the officers entered the residence, Smith was sleeping on the couch in the front room, and Shawnte Smith, a friend of Smith's, was sleeping on cushions on the floor next to the couch. The condition of the house suggested that Smith lived mostly in the living room and dining room areas. Indeed, there was no furniture in the bedrooms located on the second level and there was trash littered throughout the house.

During a search of the house, officers found a bag near the couch that contained two prescription pill bottles with the labels removed. It was determined that the bottles contained twenty-three tablets of hydrocodone, a schedule III narcotic. Another prescription pill bottle with its label removed and containing twenty-four additional tablets of hydrocodone was found across the room on stereo equipment that was sitting behind the television. When

¹ Ind. Code Ann. § 35-48-4-6 (West, Premise through 2007 1st Regular Sess.).

² I.C. § 35-48-4-7 (West, Premise through 2007 1st Regular Sess.).

questioned about the pills in the bottles, Smith stated that he had a prescription for Vicodin but that he did not know where it was or when it had been issued. Smith never produced the prescription. On a table near the television, officers discovered wrapped in a plastic baggie and stuffed into a latex glove, a large rock of crack cocaine, weighing 5.4568 grams.

In addition to the above contraband, officers found a plate and a spoon that showed evidence of having been heated with a lighter on a table in the dining room. On the same table was a white powder, possibly baking soda, which is commonly used to cut cocaine to increase its volume and thus, the profits one makes when selling it. Throughout the house, officers found numerous plastic baggies and baggie corners. One of the baggies contained .04 grams of cocaine residue. The search of the residence also netted a shotgun barrel and ammunition. Additionally, \$809 in cash was found in Smith's wallet and sock. Smith told the officers that he was not employed and that he won the money playing a dice game. Finally, mail addressed to Smith at that address was found in the residence.

On February 4, 2005, the State charged Smith with possession of cocaine, a class A felony, and possession of a controlled substance, a class C felony.³ A trial was held on June 2, 2005, at the conclusion of which a jury found Smith guilty as charged. Although Smith was present for the trial, he failed to return for the verdict, and the court issued a warrant for his arrest. On or about October 22, 2007, Smith was arrested in Cobb County, Georgia and held on a fugitive warrant. A sentencing hearing in the instant case was held on February 14, 2008. The trial court sentenced Smith to a total aggregate sentence of twenty years imprisonment. Smith now appeals.

³ The State also charged Shawnte Smith with the same offenses.

Smith challenges the sufficiency of the evidence supporting his convictions. Specifically, Smith argues that the evidence is insufficient to prove the element of “knowing” possession essential to both possession convictions. *See* I.C. § 35-48-4-6; I.C. § 35-48-4-7. When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder’s exclusive province to weigh the evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict, and “must affirm ‘if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.’” *Id.* at 126 (*quoting Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

A conviction for possession of contraband may rest upon proof of either actual or constructive possession. *See Britt v. State*, 810 N.E.2d 1077 (Ind. Ct. App. 2004). “Actual possession occurs when the defendant has direct physical control over the item, while constructive possession involves the intent and capability to maintain control over the item even though actual physical control is absent.” *Id.* at 1082. Here, our review is focused on whether Smith can be said to have been in constructive possession of the contraband.

Proof of a possessory interest in the premises in which contraband is found is adequate to show capability to maintain control and dominion over the contraband. *Massey v. State*, 816 N.E.2d 979 (Ind. Ct. App. 2004) (citing *Iddings v. State*, 772 N.E.2d 1006 (Ind. Ct. App. 2002), *trans. denied*). Smith does not dispute that the residence was his or the evidence indicating that he lived there. Indeed, Smith was sleeping inside the residence when the

search warrant was executed. Furthermore, during the search, officers found mail addressed to Smith at that address as well as personal effects belonging to Smith, including his wallet, his passport, and his membership card for a hunting club. Smith was also aware of other items found in the house that were not readily visible to the casual visitor. Officers questioned Smith about a shotgun barrel and ammunition that was found in an upstairs bedroom, and Smith acknowledged that they were his and volunteered that he belonged to a hunting club before directing the officers to his membership card. This evidence sufficiently establishes that Smith had a possessory interest in the premises and therefore, that he had the capability to maintain control and dominion over the contraband.

To prove the intent element, the State must prove the defendant's knowledge of the presence of the contraband, which may be inferred from the defendant's exclusive possession of the premises. *Id.* Where control of the premises is non-exclusive, intent to maintain dominion and control may be inferred from additional circumstances that indicate the person knew of the presence of the contraband. *White v. State*, 772 N.E.2d 408 (Ind. 2002). Additional circumstances that support finding a defendant had the intent to maintain dominion and control over contraband kept in non-exclusive premises may include, among other things: (1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the defendant to the drugs; (5) drugs in plain view; and (6) location of the drugs in close proximity to items owned by the defendant. *Massey v. State*, 816 N.E.2d 979. Further, possession of contraband by the defendant need not be exclusive and it can be possessed jointly. *Id.*

The evidence presented by the State established that there were two rooms in the residence in close proximity that were primarily used as the living quarters. Contraband and paraphernalia were in plain view throughout these rooms. Specifically, next to the couch where Smith was found asleep, officers located pill bottles containing what was later determined to be hydrocodone, a schedule III narcotic, for which Smith could not produce a valid prescription. Located in plain view across from the couch near the television and stereo was an additional pill bottle and a rubber glove that contained a large rock of crack cocaine. Throughout the two rooms, officers found plastic baggies and baggie corners, often associated with drug sales, and a spoon that appeared to have been heated with a lighter, an activity associated with cocaine use. These items were plainly visible in the rooms. Furthermore, Smith's wallet, passport, and hunting club membership card were intermixed with the contraband.

Considering the circumstances as a whole, the close proximity of Smith to the contraband, that the contraband and other indicators of drug activity were in plain view, and that the contraband was intermingled with Smith's personal effects, we conclude that the evidence sufficiently established that Smith had the intent to maintain dominion and control over the items of contraband and that he did so knowingly.

Judgment affirmed.

DARDEN, J., and BARNES, J., concur